IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 31 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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CHAUDHARY JIVATBEN DAHYABHAI - Petitioner(s)
Versus
DISTRICT PRIMARY EDUCATION OFFICER & ANR & 2 - Respondent(s)

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Appearance :

MR KB PUJARA for Petitioner(s) : 1,
MR HS MUNSHAW for Respondent(s) : 1 - 2.
MR HEMANT MAKWANA, ASST GOVERNMENT PLEADER for Respondent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 01/10/2007

ORAL JUDGMENT

1. The petitioner, widow of one Shri Chaudhary Dahyabhai Lalubhai-a primary school teacher who died

in harness on 11.09.90, has approached this Court under Article 226 of the Constitution of India seeking directions from this Court to the respondents for:

(i)making payment of difference of pay on account of the petitioner's husband's entitlement to receive higher grade pay scale for the period from 01.06.87 to 11.09.90.

(ii)making payment of difference of family pension for the period from 12.09.90 onwards on the basis of petitioner's husband's entitlement to receive the benefit of higher grade pay scale as prayed for hereinabove.

(iii)making payment of amount of LTC for the block year 1988-91.

(iv)making payment of difference of amount admissible to the petitioner's late husband under the head of Deposit Linked Insurance under the provisions of the Bombay General Provident Fund (Amendment) Rules, 1992.

(v)making payment of the amount admissible with interest at the rate of 24% per annum.

2. Mr K.B Pujara, learned advocate appearing for the petitioner has submitted that so far as the claim in respect of payment for the amount of LTC for the block year 1988-91 is concerned, the same is redressed as the petitioner has received the same and therefore the petition shall now survive only for the prayers as mentioned hereinabove in (i), (ii), (iv) & (v).

3. The facts in brief deserve to be narrated for appreciating the controversy in this matter.

3.1 The petitioner's husband joined as primary teacher on 28.03.54. He expired in harness on 11.09.90. The State had promulgated a scheme popularly known as granting of higher grade pay scale to employees completing 9, 18 & 27 years of service without any benefit of promotion though found eligible. The scheme was introduced on 05.07.91 where under the employees stagnating on the same pay scale despite they being eligible for promotion for the period of 9, 18 & 27 years, were to be accorded benefit of the higher grade pay scale on the conditions mentioned in the Government Resolution dated 05.07.91. This scheme was introduced with effect from 01.06.87 meaning thereby the employees who were otherwise eligible under the scheme and who had completed 9, 18 & 27 years of service on 01.06.87 in the same scale without promotion though eligible were entitled to receive the benefit of respective higher grade pay scales on the terms and conditions mentioned in the scheme dated 05.07.91. The clause nos. 14 and 15 of the scheme dated 05.07.91 provided for revoking the scheme of according senior pay scale to the employee completing 17 years of service which was existing then.

3.2 Under the scheme of higher grade pay scale it was provided that the employee who had already taken

benefit of the 'Senior Scale' on completion of 17 years of service were required to give option as to whether they would like to avail benefit under the scheme and in case they were opting for benefit of higher grade pay scale under the scheme of 1991 then they were to give up the benefit of 'Senior Scale' which they had received under the 17 years' scheme and the employees' pay was to be fixed under the higher grade pay scale scheme as if he had never been given the benefit of 'Senior Scale' under the 17 years completion scheme. The benefit of higher grade scale under the 17 years scheme was to be adjusted against the pay fixation that may be made under the scheme of higher grade pay scale.

3.3 It deserves to be noted that the husband of the petitioner died on 11.09.90 and the principal of his school addressed a communication on 22.04.98 to the District Primary Education Officer indicating the amount of recovery to be effected or adjusted on granting benefit of 9, 18 & 27 years higher grade scheme in case of the petitioner's husband.

3. Mr K.B Pujara, learned advocate appearing for the petitioner has contended that the plain reading of higher grade pay scale scheme dated 05.07.91 would show that the option with regard to surrendering benefit of 'Senior Scale' for receiving the benefit of higher grade pay scale was envisaged and the scheme dated 05.07.91 did not mention giving up on the part of the employee the benefit of 'Senior

Scale' for receiving the benefit of higher grade pay scale and therefore the respondents have wrongfully adjusted the amount of 'Senior Scale' for giving the petitioner the benefit of higher grade pay scale under the scheme dated 05.07.91. The respondents could not have adjusted the amount received by the petitioner's husband or the petitioner by way of 'Senior Scale' as it is reflected in the communication dated 11.09.90. What was adjusted was the 'Senior Scale' and the word 'Senior Scale' is conspicuously absent in the scheme dated 05.07.91. The 'Senior Scale' if was not required to be surrendered for availing the benefit of higher grade pay scale under the scheme dated 05.07.91 then the petitioner ought to have been given the difference in the salary for the period 01.06.87 to 11.09.90 and on that basis the difference in the family pension also should have been accorded to the petitioner being the widow of the concerned employee.

4.1 Mr Pujara has also contended that the petitioner's husband was entitled to receive the benefit under the Bombay General Provident Fund (Amendment) Rules, 1992. The Bombay General Provident Fund (Amendment) Rules, 1992 came into effect from 01.01.90- the date on which the petitioner's husband was alive and a member of the said Provident Fund. Therefore, the additional amount equal to the average balance in the account of the employee during the three years immediately preceding the death of the subscriber on fulfilling

the conditions mentioned thereunder would have been admissible to the petitioner. As the petitioner's husband was a member and subscriber on 01.01.90, the petitioner has been paid a maximum amount as envisaged under the unamended rules which was Rs. 10,000/-. Now that has been substituted by the amendment and it is mentioned therein that the additional amount payable under these rules shall not exceed Rs. 30,000/-. Accordingly, the petitioner is required to be paid the difference in its amount under this head also as the rule has been amended with retrospective effect from 01.01.90 and as on that date the petitioner's husband was a subscriber and member of the fund.

4.2 Mr Pujara has also claimed interest at the rate of 24% relying upon the decision of the Apex Court in the case of Vijay L. Mehrotra vs. State of U.P and Ors reported in 2001(9) SCC 687.

5. Mr H.S Munshaw, learned advocate appearing for the respondent no.1 & Mr Hemant Makwana, learned AGP appearing for the respondent no.2 jointly submitted that from the documents available on record they are unable to point out before this court as to whether the husband of the petitioner had infact received the benefit of 'Senior Scale' as envisaged under clause 14, 15 & 17 of the 1991 resolution. However, they have submitted that the 1991 scheme itself was revoked and the scheme of 1994 had taken place thereof and therefore looking to the 1994 scheme

wherein the word “senior scale” is mentioned, it could be said the selection scale was required to be adjusted. It is however submitted that the scheme in respect of Provident Fund linked insurance and the clarificatory circular of the Finance Department clearly show that the cases which are over long back were not required to be reopened. Both the counsel have argued that the payment to the petitioner under the scheme was made as per then prevalent rules and therefore the amendment though effected from 01.01.90 the same cannot be said to have been in any way of any avail to the husband of the petitioner who died on 11.09.90 i.e before the amendment came into being.

6. This Court has heard learned counsel for the parties and perused the papers on record. A perusal of the scheme of 1991 so far as the claim with regard to the higher grade scale is concerned becomes relevant. From the record, the counsel for the respective parties are unable to point out unequivocally as to whether infact the petitioner's husband was in receipt of the 'Senior Scale' after completion of 17 years of service. It also deserves to be noted that the scheme of 1991 did not mention any adjustment of amount received under the “Selection Grade”.

6.1 On the basis of the record available with the authorities if it is found that the petitioner's husband never received the senior grade scale as envisaged under the rules then he would have been

entitled to receive higher grade scale without any deduction or adjustment but however if it is found from the record that the petitioner's husband had received the benefit of 'senior grade scale' after completion of 17 years of service as envisaged under the scheme of 05.07.91 then the deduction made would be justified. Therefore it would ultimately depend upon the facts which needs to be verified from the record as it is submitted by all the three counsel. It is also not clarified by the widow-petitioner as to whether her husband infact received the benefit of 'senior scale' on completion of 17 years of service and whether there was a difference between 'senior scale' or 'selection scale'. Therefore proper directions need to be given in this behalf. The court proposed to advert to the same at the end of the judgement after examining the scheme in respect of the amount of difference of the claim to be payable to the widow-petitioner on the basis of the deposit linked insurance scheme.

6.2 The petitioner's claim in respect of the applicability of notification dated 10.05.93 in the case of her husband needs positive consideration. It deserves to be noted that the notification dated 10.05.93 is issued under the exercise of powers conferred by the proviso to Article 309 of the Constitution of India amending the Bombay General Provident Fund Rules which is entitled as the “Bombay General Provident Fund (Amendment) Rules, 1992”. Clause 2 of the notification dated 10.05.93

unequivocally makes it clear that they shall be deemed to have come into force from 01.01.90 and therefore by virtue of deeming fiction when this amendment came into force on 01.01.90 he could be said to have been governed by this amendment. As per this amendment, after rule 30A, the following rule is inserted which is reproduced hereinbelow:

> ”4. In the said rules, after rule 30-A the following shall be inserted, namely:-
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> “30-B Deposit linked Insurance Revised Scheme:-On death of a subscriber, the person entitled to receive the amount standing to the credit of the subscriber shall be paid by the Accounts Officer an additional amount equal to the average balance in the account during the 3 years preceding the death of such subscriber subject to the conditions that-
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> (a) the balance at the credit of such subscriber shall not at any time during the 3 years preceding the month of death have fallen below the limits of-
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> (i)Rs. 12000 in the case of subscriber who has held, for the greater part of the aforesaid period of (3) three years a post of maximum of the pay scales of which is Rs. 4000 or more.
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> (ii)Rs. 7500 in the case of a subscriber who has held for the greater part of the aforesaid period of thre years, a post of the maximum of the pay scale of which is Rs. 2900 or more but less than Rs. 4000.
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> (iii)Rs. 4500 in the case of a subscriber who has held for the greater part of the aforesaid period of three years, a post of

maximum of the pay scale of which is Rs. 1151 or more but less than Rs. 2900.

(iv)Rs. 3000 in the case of a subscriber who has held for the greater part of the aforesaid period of three years a post of maximum of the pay scale of which is Rs. 1151.

(b) the additional amount payable under this rule shall not exceed Rs. 30000/-.

(C) the subscriber has put in atleast 5 years of service at the time of his death”.”

7. It is admittedly the case of the petitioner that her husband had maintained the balance as required under the amended rules and therefore he could not have been denied benefit as envisaged. These rules have come into force by deeming fiction as per clause 2 of the notification with effect from 01.01.90 meaning thereby the scheme is applicable in its amended form by deeming fiction to all the members of the scheme existing and continuing to exist on 01.01.90. Therefore in absence of any exception clause in the amended portion and the amended notification dated 10.05.93, the persons whose cases were over by 1993 cannot be denied the benefit by virtue of a policy which is sought to be relied upon by the respondent which is in nature of a clarificatory circular dated 09.01.95 issued by the department of finance.

8. It is not attempted by the respondents to say that this policy is under the exercise of powers

under Article 162 of the Constitution of India and the decision framed by way of policy as it is reflected in the Finance Department circular can surely have no effect of nullifying the statutory provisions of the notification dated 10.05.93. which provides that the said notification is under exercise of powers under Article 309 of the Constitution of India and the rules are framed which provides unequivocally that the same is admitted to have come into effect from 01.01.90 underlying the said unequivocal statutory rules. The right of the deceased and is heirs cannot be denied on the basis of the so called clarificatory circular issued by the Finance Department in the name of policy as it is stated hereinabove. It is not even attempted to project that the clarification was issued under exercise of powers under Article 162 of the Constitution of India and therefore without expressing any opinion on that aspect this Court is inclined to accept the submission that the statutory rules cannot be amended by the clarificatory circular subsequent in point of time so as to deny the mandatory benefits accruing from the policy of the statutory rules and therefor on this account this court is of the view that if the deceased husband of the petitioner was fulfilling the criterion mentioned in the notification dated 10.05.93 of maintaining the minimum balance in the Provident Fund Account then he was entitled to the benefit of this notification and if on that basis whatever amount is payable is not paid then the entire exercise is required to be

termed to be arbitrary and violative of Article 14 of the Constitution of India and therefore the same deserves to be deprecated.

9. Thus from the aforesaid it clearly emerges that the petitioner's husband if had not received the benefit of 'Senior Scale' on completion of 17 years of service as envisaged under the 1991 scheme and the “Selection Scale” if was found not to be equivalent tot he 'Senior Scale' then no adjustment was required to be ordered on that count. It deserves to be noted at this stage that the 1994 scheme promulgated on 16.08.94 clearly provided in Clause 3 that the teachers who have retired on or before 01.08.94 no recovery was to be effected and even in cases of the teachers who retired on or before 31.07.94 and in whose case the higher grade scale was not sanctioned on account of administrative reasons they also would be entitled to receive the benefit of higher grade pay scale and their pension is to be decided in accordance there with and recovery in their cases was given up. This clause is on page 45 of the compilation of this petition. In line of this provision, now what is required to be looked into is only that whether the petitioner's husband ever received the benefit of 'Senior Scale' after his completion of 17 years of service as envisaged in the scheme of 1991. As it is stated hereinabove, learned counsel for the respective parties have shown their inability to make any specific statement to this effect.

9.1 This court is unable to accept the submission with regard to ordering payment with interest on the basis of the decision of the Apex Court in the case of Vijay L. Mehrotra (supra). The controversy needed adjudication and therefore the respondent cannot be said to be solely responsible for the delay in making the payment and therefore the claim for interest is rejected by this Court.

10. In view of the aforesaid discussion, this Court is left with no choice but to mould the relief so far as this claim is concerned as under:

(i)The respondents are hereby directed to undertake the exercise of ascertaining in unequivocal terms as to whether the petitioner's husband- late Shri Chaudhary Dahyabhai Lalubhai was infact in receipt of the benefit of senior grade scale on his completion of 17 years of service which is subject matter of clause 14, 15 & 17 of the scheme dated 05.07.91. This 'Senior Scale' if found to have been received by the petitioner's husband then in that case only the adjustment shall be permissible.

(ii)If after it is found that the petitioner's husband was not in receipt of the 'Senior Scale' as envisaged under the scheme of 1991 then the benefit accrued under the scheme of 1991 ought to have been granted to the husband of the petitioner without any deduction or adjustment.

The respondent shall undertake that exercise afresh and record its clear finding on the basis of the documents available with them.

(iii)If it is found that he was not in receipt of the senior grade and that the senior scale which is talked about in the resolution is a different scale then the benefit accruing under the scheme of 1991 should be granted without deduction.

(iv)The respondents shall undertake the exercise of ascertaining as to whether the petitioner's husband fulfilled all the criteria laid down under the Clause 30B of the notification dated 10.05.93 and if it is found that he was maintaining the balance fulfilling the criterion laid down thereunder then clause 30B is clearly applicable to the case of the petitioner's husband and on that basis the amount of difference is ordered to be paid to the petitioner.

(v)Both the aforesaid exercises should be completed within a period of of eight weeks from the date of receipt of the writ of this court.

(vi)If the respondent shall at the end of the exercise come to the conclusion that any amount becomes payable to the petitioner on the basis of the aforesaid declaration then the petitioner shall be paid within a month thereafter and if incase it is not paid within one month thereafter then the same shall carry interest at the rate of 12% per annum till the date it is paid.

11. With the aforesaid directions and clarifications this petition is disposed of. Rule is made absolute to the aforesaid extent. Direct service is permitted.

(S.R.BRAHMBHATT, J.)

Divya//